OII, extensive litigation over the interpretation of CPUC policy on cell-siting permits, numerous tariff filing protests, and now this petition before the FCC.

What has been accomplished by all of the CPUC's rate and entry regulation? It is difficult to identify any positive results directly attributable to the regulation. What has resulted from the CPUC's regulation is years of expensive litigation, structural impediments to a fully competitive market in terms of restrictions on the filing of rate plans and marketing cellular telephone equipment, and now burdensome requirements to unbundle cellular carriers' networks. The networks of competing CMRS providers will not be so encumbered. This is not the legacy of a successful regulatory program, and it argues strongly against the relief sought by the CPUC in its Petition.

Yet of all the consequences of CPUC regulation of cellular service, the worst are yet to come. The CPUC has given a clear indication in both D.94-08-022 and the Petition that in a second phase of its Investigation it "will consider...adjusting existing price caps to restrain duopoly market power abuses...." Petition at 81. The CPUC's intention is to adjust the price caps by reference to "excessively high rates of return of carriers." Id. Setting rates by reference to the CPUC's notion of appropriate carrier profits is rate of return regulation, pure and simple. Furthermore, it clearly involves all the baggage that

accompanies cost of service regulation, even if the CPUC expresses a desire not to conduct the studies which would normally be a part of such regulation. Petition at 81.

While the telecommunications policy of the federal government is advancing toward a goal of open, competitive markets with minimal intrusion from regulatory bodies, the CPUC is moving (and moving fast) in the exact opposite direction. For a regulatory body to assert that it can regulate rates through a cost of service/rate of return analysis at a pace and with an accuracy to emulate the competitive forces in today's wireless communications market is simply not credible. The CPUC has abandoned such practices for local exchange carriers,[123] and yet sees fit to impose them for the first time on cellular carriers at the very moment that additional entrants are lined up to receive allocations of radio spectrum to provide PCS service in California.

The Carriers Association believes that CPUC regulation in its current form, and certainly in the form described in the Petition, is fundamentally inconsistent with federal policy for the regulation of CMRS providers. The CPUC knowingly intends to violate the central tenet of federal policy, which favors uniform regulation of providers of similar service. Yet the CPUC has offered no logical explanation for a policy which will impose serious and potentially crippling burdens on

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[123] See D.94-06-011; 153 P.U.R. 4th 65; 1994 Cal. PUC LEXIS 456 at [*2].

cellular carriers (rate of return/adjusted price caps) while ESMR and PCS providers will be free of such constraints. The CPUC has made no effort to justify its policy even in the broadest terms, for example by claiming that cellular carriers should be suppressed in order to allow ESMR and PCS providers to obtain a niche in the marketplace.

The CPUC's Petition to retain its tariff regulations, to impose rate of return-adjusted price caps, and to require mandatory filing of unbundled wholesale tariffs also completely contradicts FCC policy, which holds that it is not necessary to tariff CMRS, even in the present competitive climate. Second Report and Order at 8. With the advent of ESMR and PCS service across the nation the rationale for tariffing will diminish even further.

The long term implications of CPUC policy are also very troubling. If the ultimate expression of competitive forces in the wireless industry is to provide competing national networks of cellular/PCS providers, how will those networks be affected by the imposition of restricted and cellular-specific regulations in California? The Carriers Association asserts that permitting individual states to design and implement their own idiosyncratic rate regulations <u>at this time</u> is completely incompatible with the goal of allowing market forces to shape new and improved wireless communications networks which are national in scope. The case can, and has, been made by the Carriers Association and the individual

carriers that the existing cellular market is competitive now. There is, therefore, no reason to permit the rate regulation sought by the CPUC. Even more importantly, however, as the FCC looks into the immediate future and sees the number of potential CMRS competitors poised to enter markets like California, it makes no sense to force the existing cellular carriers to take a detour into the realm of CPUC-style rate regulation. As the Charles River report remarked, "it is difficult to think of a request that has been more poorly timed." Report at 32.

IV. MAJOR ELEMENTS OF THE CPUC'S PETITION ARE PREEMPTED BY THE BUDGET ACT OF 1993 OR FAIL TO COMPLY WITH THE COMMISSION'S REGULATIONS GOVERNING SECTION 332(c)(3) PETITIONS AND THEREFORE MAY NOT BE CONSIDERED BY THE COMMISSION

The CPUC submitted its Petition under Section 332(c)(3)(B) of the Communications Act, as amended by the Budget Act of 1993. Petition at 1. It has not filed under Section 332(c)(3)(A) for approval of any new regulations of cellular telephone rates. Nevertheless, the CPUC has mixed existing and proposed new regulations in its Petition. This appears to be an effort to grandfather both pre-existing rules and new rules which the CPUC either promulgated well after June 1, 1993, or which it has not yet even issued.

However, the new rules included in the Petition are not grandfathered and are, therefore, preempted by Section 332(c)(3)(A) as of August 10, 1994. The CPUC has failed to present its new regulations in a proper petition pursuant to

Section 332(c)(3)(A) and is not entitled to consideration of those rules by the Commission at this time. Moreover, the CPUC has not described in sufficient detail the proposed regulations that it has included in its Petition. Thus, even if those proposals were properly presented in a Section 332(c)(3)(A) petition, they would not comply with Section 20.13(a)(4) of the Commission's regulations and the Commission therefore could not approve them.

A. The CPUC's Proposed New Rules Governing Cellular Rates Are Not Specifically Defined, as Required by the Commission's Regulations, and Therefore Are Not Properly Before the Commission

The CPUC's Petition seeks approval of the policies and rules governing cellular telephone services which it described in its D.94-08-022.[124] These policies and rules include four elements: retention of the existing rate band regulations; potential future adjustments to the rate caps under the existing regulations, including possible rate of return regulation; unbundling of cellular service at the wholesale level; and authorization and establishment of rates for extended area service (EAS) for all cellular carriers. D.94-08-022 at 74-75, 80-81, 87-88.

However, two principal elements of the CPUC's proposed rules fail to satisfy the requirement of the Commission's regulations that states "must identify and describe in detail

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[124] D.94-08-022 is reproduced as Appendix N to the Petition.

the rules" for which they seek Commission approval. Second Report and Order, App. A, pp.7-8 (to be codified at 47 C.F.R. §§ 20.13(a)(4), 20.13(b)(1)). The Commission's requirement is a logical outgrowth of the statutory scheme. The CPUC's inability to meet it requires dismissal of the Petition's request for approval of the CPUC's proposed new cellular rate and unbundling regulations.

Congress intended when it passed the Budget Act of 1993 to create uniform federal regulation of CMRS. It therefore preempted all state regulation of such services, subject only to limited exceptions granted by the FCC pursuant to states' petitions. The Commission's insistence in its regulations that states define with specificity the rules which they seek to impose on CMRS providers is entirely consistent with -- indeed, even essential to -- successful implementation of Congress' purpose. Unless a state describes exactly what it wants the FCC to approve, the Commission cannot assess the effects of the exemption the state seeks. Equally important, allowing exemptions for ill-defined regulatory policies would quickly threaten to allow the exemptions to swallow up the statute's comprehensive rule of preemption. This the courts could not, and would not, allow. See United States v. J.E. Mamiye & Sons, Inc., 665 F.2d 336, 340 (C.C.P.A. 1981), *citing*, Corn Products R. Co. v. Commission of Internal Revenue, 350 U.S. 46, (1955) an exception which carves out something which would otherwise be included must be strictly

construed."); Israel-British Bank (London) Ltd. v. Federal Deposit Insurance Corp., 536 F.2d 509, 513 (2nd Cir. 1976) ("the normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exceptions.").

The CPUC's proposed new regulations of cellular services can be generously described as indefinite. In fact, the state commission candidly acknowledges that, in many respects, it has not even decided yet what regulations it might impose. For example, the CPUC states that it "will consider in a subsequent phase of [its cellular] investigation options for adjustments to existing price caps...." Petition at 81 (emphasis added). This may include rate reductions based on the CPUC's perception that carriers are earning "excessive" returns. Id. at 75. The CPUC thus asks the Commission essentially for a blank check insofar as rate regulation is concerned. Neither the Commission's regulations nor Section 332(c) permit such an approach, however.

The CPUC's request for approval of its wholesale unbundling proposal is likewise fatally indefinite. While the CPUC has ordered the unbundling of the "radio transmission bottleneck" (Decision at 93 (Finding of Fact 51)), it does not describe how this is to be accomplished. Indeed, the CPUC does not even know if it can be accomplished; it acknowledges that there are, in its words, "technical uncertainties" about the nature of the functions that reseller switches may be

capable of performing. Id. at 94 (Finding of Fact 53). Thus, the CPUC has not determined, and has not described to this Commission in the Petition, either the scope of the services that it wants cellular carriers to unbundle or how the carriers should establish rates for such services.

B. The CPUC Has Requested Approval of Regulations Which Were Not In Effect On June 1, 1993; These Regulations Are Preempted As Of August 10, 1994, And Are No Longer Effective

By its own admission, the CPUC has imposed new rate regulations on cellular carriers in California and is proposing to adopt more new rules in the near future. D.94-08-022 states clearly that the CPUC has embarked on a new course. Although it has retained its previously-effective price caps, it also adopted its "proposed dominant/non-dominant framework...for development of regulatory oversight." D.94-08-022 at 69. It further stated that it "will consider in a subsequent phase of this investigation options for adjustments to existing price caps...," potentially including "ways to adjust price caps referenced against excessively high rates of return of carriers." Id. at 75. The CPUC also provided that, upon a reseller's fulfillment of certain conditions, it will order the affected cellular carrier "to promptly file...to amend its wholesale tariff reflecting a market-based unbundling of access charges...." Id. at 97.

Congress in §332(c)(3)(A) has allowed states to petition the Commission to permit new regulations to escape federal

preemption. The Budget Act of 1993 is clear, however, that such new regulations are preempted until the Commission makes a determination on the Petition. The only exception to the immediate preemption is for state rate regulations that existed at the time of enactment. The CPUC, however, seeks to promulgate and enforce new regulations by mixing the two procedures of Section 332(c) and by acting as if its new regulations qualify as "existing" under the Act simply because the state agency had other cellular telephone regulations in effect at the time of enactment. See D.94-08-022 at 82.

The CPUC's interpretation of the "existing regulation" exception to preemption does not make sense, is inconsistent with the purpose of the Act, and creates an exception that would swallow the rule. Therefore, as mandated by Congress, the Commission must affirm that (1) the regulations promulgated by the CPUC in 1994 -- and those yet to be promulgated -- may not take effect until this Commission determines if the CPUC should be granted the necessary authority; and (2) the only CPUC rate regulations not presently preempted by the Budget Act of 1993 are the specific regulations that were in effect on June 1, 1993.

1. Budget Act of 1993

The Budget Act of 1993 clearly preempts all State regulation of the entry of, and the rates charged by, any commercial mobile service company:

> (3) State Preemption. - (A) Not withstanding sections 2(b) and 221(b), no State or local

> government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. §332(c)(3)(A). Congress went on to establish a few exceptions to federal occupation of the field. For example, it provided that, where mobile services substitute for land line services for a substantial portion of communications, state requirements regarding universal service are not preempted, notwithstanding the language set forth above. Congress also provided under subparagraph (A) that states may petition the Commission for authority to regulate the rates of CMRS providers. Id. However, such state regulation may take effect only upon approval by this Commission and even then will be limited to the time period and the scope established by the Commission if it grants the Petition. Id.

In Section 332(c)(3)(B), Congress addressed the treatment of existing state regulation of rates:

> (B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition.

47 U.S.C. § 332(c)(3)(B). Thus, in order to be eligible to seek exemption under this subpart, a state must have

regulations in effect on June 1, 1993. If that condition precedent is satisfied, during the pendency of the subparagraph (B) petition, "the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect." Id.

Congress thus provided that certain pre-existing state regulations would survive its general preemption, at least until the Commission ruled upon the state's petition for approval. The dispute between the Carriers Association and the CPUC is whether Congress intended the "existing regulation" exemption from preemption (i) to preserve a specific scheme of regulation in effect at a particular time, as the Carriers Association believes, or (ii) to permit a state to expand its regulations as it sees fit, provided only that it had some regulations in place on June 1, 1993, as the CPUC believes.

2. Congressional Intent

"The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana PSC, supra, 476 U.S. at 369. In the present case, no party disputes that Congress intended to supersede state regulations. The only issue is the proper breadth of the "existing regulation" exception to such preemption.

The Supreme Court has stressed the importance of using context to ascertain the plain meaning of a statute. K Mart

Corp. v. Cartier Inc., 486 U.S. 281, 291 (1988). In cases where an exception is inconsistent with Congress's primary objective, courts have found that "the narrower reading of the exemption ... creates the greatest amount of harmony in the overall statutory scheme." Delta and Pine Land Co. v. Peoples Gin Co., 694 F.2d 1012, 1016 (5th Cir. 1983).

The same is true of the Carrier Association's narrow interpretation of the statutory exception at issue in this case. Congress' desire to preempt state jurisdiction in favor of creating symmetrical, federal regulation of all wireless services is best effected by limiting to the specific terms of the statute the scope of the state regulations that its enactment left intact.

The CPUC's reading of the statute, in contrast, makes no sense. There is no dispute that the statute preempts state rate regulation, yet the CPUC's reading of the exception for "existing regulation" would undo the major thrust of the preemption Congress contemplated. To give effect to the CPUC's interpretation, one would have to ascribe to Congress an intent to permit any state that had some bare minimum form of rate regulation in place on June 1, 1993, to be exempt from preemption of any exercise of authority over CMRS rates prior to August 10, 1994.

The CPUC's reading of §332(c)(3)(B) would create an exception that would swallow the rule. Courts have clearly frowned on such expansive interpretations and have recognized

that exceptions are to be strictly construed, placing the burden squarely on those who seek to come within the terms of the exception. United States v. Luna, 768 F.Supp. 705, 708 (N.D. Cal. 1991), *citing* A.H. Phillips v. Walling, 324 U.S. 490, 493 (1945) ("statutory exceptions are to be strictly construed so as to prevent the exception from swallowing the rule"). See also United States v. J.E. Mamiye & Sons, Inc., 665 F.2d 336, 340 (C.C.P.A. 1981), *citing* Corn Products R. Co. v. Commissioner of Internal Revenue, 350 U.S. 46 (1955) ("it is appropriate to rely on the usual rule of statutory construction that an exception which carves out something which would otherwise be included must be strictly construed."); Israel-British Bank (London) Ltd. v. Federal Deposit Insurance Corp., 536 F.2d 509, 513 (2d Cir. 1976) ("the normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exceptions."). The CPUC's interpretation must be rejected because it would render meaningless Congress' carefully crafted exemption to the federal preemption it legislated.

The legislative history of the Budget Act of 1993 supports the Carriers Association's interpretation and further undercuts the CPUC's position. The Conference Report shows that Congress intended that the "existing regulation" exception to the general rule of preemption is to be narrowly construed:

> The Conference Agreement clarifies that state authority to regulate is "grandfathered" only to

> the extent that it regulates commercial mobile services "offered in such State on such date".

Conference Report at 493. That the "existing regulation" exception was intended by Congress to be a "grandfather clause" demonstrates that it was targeted to continue in effect regulations already in existence, rather than to permit expansion of state regulation prior to submission of an exemption petition to the FCC. If the grandfather clause were construed as the CPUC suggests, the "extent" of state regulation on a particular date would be irrelevant. Under that reading, so long as a state had in place even a scintilla of regulation on the pertinent date, all future extensions of the state's regulatory reach would be grandfathered. To the contrary, however, Congress clearly intended to preserve only those particular state regulations that were in effect on the prescribed date.

The CPUC's view also contravenes judicial precedent which vehemently declares that "grandfather clauses" are to be narrowly construed. See Honeywell Inc. v. United States, 661 F.2d 182, 186 (Ct.Cl. 1981) ("Grandfather clauses are construed strictly against those who invoke them."). Courts have particularly stressed narrow interpretation when the grandfather clause provides an exception to a comprehensive scheme of regulation. United States v. Articles of Drug: 5906 Boxes, 745 F.2d 105, 113 (1st Cir. 1984) ("We note at the outset that, as an exemption to a comprehensive regulatory statute..., the grandfather clause is to be strictly

construed, and Alcon bears the burden of proof as to each condition."). See also United States v. Allan Drug Co., 357 F.2d 713, 718 (10th Cir. 1966, *citing* Spokane & Inland Empire Railroad Co. v. United States, 241 U.S. 344, 350 (1916).

3. The CPUC's Regulations

The Carriers Association does not dispute that the CPUC's rate regulations lawfully promulgated prior to June 2, 1993 may remain in effect until the Commission determines otherwise. For example, the Carriers Association agrees that the CPUC's specific price cap regulations come within the "existing regulation" exception to preemption. The issue presented here, however, is the effect of the new regulations that the CPUC promulgated on August 4, 1994, in D.94-08-022 and of the future state regulations that the decision contemplates. In the Petition, the CPUC states that it "seeks to retain its existing price cap regulation of cellular rates." Petition at iii. The CPUC goes on to assume, however, that it may add additional, new regulations and nevertheless escape the Budget Act of 1993's preemption of all state regulations not in effect on June 1, 1993.

The Commission must deny the CPUC's request to bring the state's new regulations within the "existing regulation" exception. The CPUC admits that the rules established in its decision are new rules; it refers in the Petition to its "proposed regulatory rules for CMRS." Petition at 17

(emphasis added). Moreover, the state commission seeks to leave the door open for still more new regulations:

> The CPUC will consider in a subsequent phase of this investigation options for adjustments to existing price caps to restrain potential duopoly market power abuses while avoiding the need for cost-of-service studies. For example, we may also consider ways to adjust price caps referenced against excessively high rates of return of carriers.

Petition at 81.

The CPUC anticipates future action regarding "full implementation of a comprehensive regulatory framework" applicable to cellular carriers. D.94-08-022 at 68. It is inconceivable that Congress in a single statute could forcefully express a policy preference for symmetrical, federal regulation of mobile wireless services and at the same time countenance such a dramatic expansion of state authority. Yet that is exactly what this Commission would have to accept to approve the CPUC's proposed new regulations governing cellular carriers' rates. The Commission therefore must reject the CPUC's Petition insofar as it seeks to preserve the state commission's new and future rate and unbundling regulations for California's cellular carriers.

E. The CPUC's Unbundling Requirement Is Also Preempted Because It Would Impede The Achievement of Federal Policy Goals And Would Interfere With Federal Regulation

The CPUC's Decision 94-08-022 requires each cellular carrier "to unbundle the cell site radio segment of its operations from all landline network functions and ancillary

functions for tariffing purposes." D.94-08-022 at 76. According to the CPUC, the unbundling requirement will permit the interconnection and use of reseller switches. Id. at 80-84. Thus, the CPUC intends to compel cellular carriers, upon receipt of a *bona fide* request from a reseller, to purchase and install the costly new equipment necessary to unbundle the radio signal from the other services they provide. The CPUC's justification for its action is that unbundling of the radio signal is necessary to mitigate the alleged market power of the cellular carriers. Decision at 81. The CPUC asserts that its action is not inconsistent with any federal statute, policy, or rule because the interconnection and use of a reseller switch is not precluded by any such federal directive. D.94-08-022 at 82.

Each of the several legal defects of the CPUC's unbundling requirement is equally fatal to the state commission's effort. As explained previously, the unbundling requirement is invalid because it is not defined with the necessary specificity under the Commission's regulations governing petitions under Section 332(c)(3) and because it constitutes a new regulation which is not grandfathered by the terms of Section 332(c)(3)(B). Even apart from those flaws, however, the unbundling requirement is unlawful because it conflicts with federal policies and rules regarding CMRS providers and interstate communications.

1. The Unbundling Requirement is An Obstacle to the Policies of the Budget Act of 1993

The Commission noted in its Second Report and Order in its CMRS proceeding that Congress considered the Budget Act of 1993 in the context of growing concern about disparate regulatory treatment of providers of wireless communications services:

> Because of the greater degree of regulation imposed on common carriers (federal and state regulation) than on private carriers, common carriers argued that continuing to treat wide-area SMRs and PCPs as private carriers placed competing common carrier services at a regulatory disadvantage. In 1992, this debate was given new urgency by the Commission's proposal to allocate spectrum to PCS. In its PCS proposal, the Commission left open the question of whether PCS would be treated as a common carrier service, a private carrier service, or a combination of both. The concern that a new generation of mobile services could be subject to inconsistent regulation caused many to argue that the existing regulatory regime should be revised.

Second Report and Order at 5-6. The Commission went on to explain the effect of the new legislation on the uneven regulatory landscape:

> Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers.

Id. at 7. To implement this Congressional directive, the Commission acted to "establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace [and to] establish, as a principal objective, the

goal of ensuring that unwarranted regulatory burdens are not imposed upon any ... CMRS providers...." Id. at 8.

In a related notice of proposed rulemaking, the Commission solicited comments on whether it should "establish any interstate interconnection obligations applicable to CMRS resellers using their own switches." Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 9454, RM-8012, Released July 1, 1994, at 55 ("NPRM"). The Commission also raised and requested comment on the issue of whether it should preempt states from imposing interconnection obligations. NPRM at 61.

When Congress intends to preempt state regulation, if a "state law stands as an obstacle to the accomplishment and execution of the full objective of Congress," then the state requirement is invalid under the Supremacy Clause of Article VI of the Constitution. Louisiana PSC, 476 U.S. at 368-69. The CPUC's unbundling requirement for cellular carriers interferes with federal regulation of CMRS providers and is therefore preempted. The CPUC's decision would force cellular carriers, but no other classes of CMRS providers, to unbundle their radio signals. This discriminatory regulatory obligation contravenes the Congressional objectives of regulatory symmetry and prevention of unwarranted regulatory burdens. Congress' purpose in creating the new CMRS/PMRS dichotomy and in preempting state regulation of CMRS rates and entry was to ensure equal regulatory treatment within each

class of CMRS providers. The CPUC's unbundling directive creates the very type of disparate regulatory burden that Congress acted to eliminate and to prevent.

If the CPUC's requirement is implemented, cellular carriers would endure the economic and competitive effects of mandatory unbundling for years. Cellular carriers would be burdened with extra costs associated with the equipment needed to implement the unbundling and with the costs of complex regulatory proceedings to allocate costs between wholesale and retail services and among wholesale services. CMRS providers other than cellular carriers would face no similar costs or administrative burdens.

The ultimate result of such state regulation would be the destruction of the level economic playing field that Congress intended to provide for all CMRS providers. Such disparate regulatory treatment of different classes of mobile radio services is precisely what Congress amended Section 332 of the Communications Act to prevent. The CPUC's unbundling requirement is an invalid interference with the federal regulatory scheme and the FCC therefore cannot approve the CPUC's request for approval of that requirement.

2. The Unbundling Requirement is Likewise Invalid Under Section 2(A) of the Communications Act

The CPUC's unbundling requirement is also preempted by Section 2(A) of the Communications Act, 47 U.S.C. §152(A). Section 2(A) provides that the FCC has exclusive jurisdiction over interstate communications. Moreover, state regulation of

intrastate communications also may be preempted under this section, if it is not possible to separate the subject of regulation into interstate and intrastate components. Pub. Serv. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C.Cir. 1990).

The CPUC has not distinguished between intrastate and interstate communications, implying that it seeks to permit resellers to use their mandated interconnections to handle interstate, as well as intrastate, calls. The unbundling requirement is, without question, preempted to the extent that it would encompass interstate communications.

The Commission should further find the CPUC's directive to be preempted even as to intrastate communications. The Commission is presently considering the very question of cellular interconnections that the CPUC purports to have decided. NPRM, cc Dkt. No. 94-54/RM-8012, *mimeo* at 61 (¶143). Moreover, just as the Commission has recognized with respect to interconnections between CMRS providers and LECs,[125] in an interconnection of a cellular carrier to a reseller's switch, the same physical plant would be used for both interstate and intrastate services. Accordingly, the FCC's jurisdiction over the interstate aspects of the interconnection necessarily would preclude state jurisdiction over intrastate aspects. See Cellular Interconnection, 2 FCC R. 2910, ¶12 (1987). The CPUC's effort to mandate and regulate interconnections of

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[125] Second Report and Order, 9 FCC Red. at 1498.

cellular carriers with resellers' switches is, therefore, invalid as to both intrastate and interstate services.

V. CONCLUSION

The Petition of the CPUC should be denied by the Commission for a host of reasons. The Petition itself is defective because, 1) it fails to properly define the regulations the CPUC seeks to impose, 2) it improperly mixes existing and new regulations in an attempt to avoid the effect of the grandfathering provisions of the Budget Act of 1993, and 3) it proposes regulations such as the unbundling of carriers' networks, which are clearly preempted by federal law. The economic evidence which the CPUC offers to meet its burden of proof is equally defective. The CPUC has improperly cited extensive amounts of non-public information which the FCC cannot use to reach its decision, and responding parties are completely denied a fair opportunity to respond to the "evidence" submitted by the Commission.

Most importantly, however, the economic arguments advanced by the CPUC are a concoction of misunderstandings, mischaracterizations and a failure to believe or address the fundamental fact that cellular rates are declining in response to active rate competition amongst carriers. The entire complaint of the CPUC, if summarized in one concept, is that "rates haven't fallen far enough, fast enough." The reason they have not fallen to the levels the CPUC would like to see is that the cellular industry is not a traditional utility

industry in equilibrium. It is a young, rapidly expanding industry undergoing dramatic technological change and fighting the effects of a constrained supply of radio spectrum. The CPUC errs by expecting cellular carriers' returns to mirror those of electric, gas, or even local exchange telephone utilities. Moreover, the CPUC simply cannot accept the fact that current market conditions result in current cellular rates. The answer to this dilemma, as everyone engaged in this debate knows, is, to paraphrase Nextel, "spectrum, spectrum, spectrum." The CPUC cannot provide additional spectrum. However, the FCC can, and has proceedings underway to address the necessary additional spectrum.

What can the CPUC add to the regulation of the cellular industry while the FCC is opening the door to PCS providers? From the Petition, it would appear that the CPUC is only prepared to add cost-based rate of return regulation, uneven and discriminatory regulations applied to cellular carriers but not to ESMR and PCS competitors, and a host of minor regulations and tariff rules which simply impede the functioning of market forces.

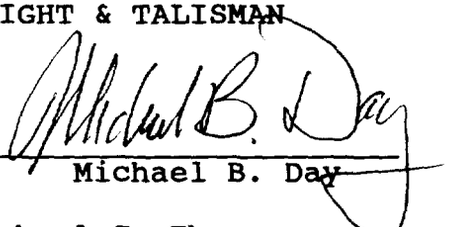
Perhaps most disturbing, the proposed CPUC regulations present an imposing obstacle which would make the California market inhospitable for those cellular companies who attempt the task of creating a national network for wireless communications. If the FCC wishes to implement the well-established federal policies of fostering symmetrical

regulation for similar services, and avoiding unnecessary regulation, the CPUC's Petition could hardly be more unattractive. As the Charles River report so vividly explained, the CPUC's request to impose its particular vision of intensive regulatory oversight at the very moment that competition in the CMRS industry is about to multiply dramatically represents a masterpiece of bad timing.

Now is not the time to retreat into outmoded forms of rate regulation, rather it is the time to ensure that there are no obstacles amongst the individual states to the implementation of a uniform federal policy to encourage the development of the commercial mobile radio services industry. The Commission should deny the CPUC Petition, to preserve the intent and effect of federal telecommunications policy and to allow the proven benefits of competition to flow unimpeded to California cellular customers.

Respectfully submitted,

WRIGHT & TALISMAN

By 
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September 19, 1994

CERTIFICATE OF SERVICE

I, Jerome F. Candelaria, hereby certify that on this 19th day of September 1994, a true and correct copy of the foregoing RESPONSE OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA OPPOSING THE PETITION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO RETAIN STATE REGULATORY AUTHORITY OVER INTRASTATE CELLULAR SERVICE RATES was mailed first class, postage prepaid to the parties listed below:

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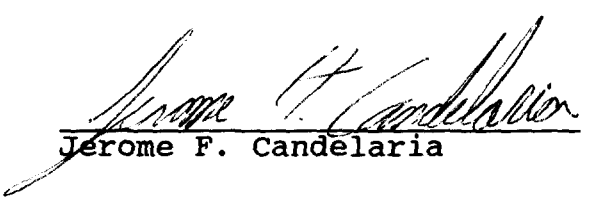

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